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No. 105, Original

In the Supreme Court of the United States

STATE OF KANSAS, PLAINTIFF

v.

STATE OF COLORADO

ON EXCEPTIONS TO THE FOURTH REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF KANSAS

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Court should appoint a "river master" to resolve computer modeling issues that may arise after entry of a contemplated decree in this case. (Kansas Exception 1).

2. Whether Kansas is entitled to prejudgment interest, accruing from 1985 forward, for damages resulting from Compact violations from 1950 to 1985. (Kansas Exception 2).

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STATEMENT

The State of Kansas brought this original action against the State of Colorado to resolve disputes under the Arkansas River Compact, Act of May 31, 1949, ch. 155, 63 Stat 145 (Compact). This Court granted Kansas leave to file its complaint, *Kansas* v. *Colorado*, 475 U.S. 1079 (1986), and the Court appointed the Honorable Wade H. McCree, Jr., to serve as the Special Master. 478 U.S. 1018 (1986). Upon Judge McCree's death, the Court appointed Arthur L. Littleworth as the Special Master, 484 U.S. 910 (1987). Special Master Littleworth granted the United States' unopposed motion for leave to intervene in the action, conducted a trial limited to questions of liability, and submitted a report,

which recommended that the Court find that Colorado had violated the Compact in certain respects. 513 U.S. 803 (1994). This Court overruled the exceptions of both Kansas and Colorado to the Master's First Report. 514 U.S. 673 (1995).

The Master subsequently submitted a Second Report that addressed preliminary issues respecting a remedy, and the Court invited the parties to file exceptions. 522 U.S. 803 (1997). Colorado filed two exceptions, which were overruled without prejudice to Colorado's right to renew those exceptions at the conclusion of the remedy phase of the case. 522 U.S. 1073 (1998). After further proceedings, including a trial on the appropriate remedy for Colorado's violations of the Compact, the Master issued a Third Report, containing his recommended remedy for Colorado's violations of the Compact. 531 U.S. 921 (2000). Both Kansas and Colorado filed exceptions to the recommended remedy. The Court sustained, in part, one of Colorado's exceptions, pertaining to the calculation of prejudgment interest, and recommitted the case to the Master. 533 U.S. 1 (2001).

The Master conducted further trial proceedings and has now submitted his Fourth Report, which addresses the outstanding issues respecting an appropriate remedy. See 124 S. Ct. 951 (2003). Kansas has filed six exceptions to that report. The United States submits this brief to address two of Kansas's exceptions, pertaining to the appointment of a "river master" and calculation of prejudgment interest for the period from 1950 to 1985, and the United States urges that those exceptions be overruled. The United States takes no position on the remaining exceptions, which involve remedial issues of principal concern to Kansas and Colorado.

A. The Arkansas River Basin

The Arkansas River originates on the east slope of the Rocky Mountains in central Colorado and flows south and then east across Colorado and into Kansas. It receives significant in-flows from the Purgatoire River, its major tributary in Colorado, which originates in the Sangre de Cristo mountains in southern Colorado near the New Mexico border. The Purgatoire River flows in a northeasterly direction to join the Arkansas River about 60 miles west of the Kansas border, at Las Animas, Colorado. See *Kansas* v. *Colorado*, 514 U.S. at 675-676.

The United States has constructed three water storage projects on this river system. The John Martin Reservoir, located immediately east of the juncture of the Purgatoire and Arkansas Rivers in Colorado, is operated by the Army Corps of Engineers to control floods and to provide storage water in accordance with the Arkansas River Compact. It has a storage capacity of approximately 700,000 acre-feet. 514 U.S. at 677. The Pueblo Reservoir, located on the Arkansas River about 150 miles upstream of the Kansas border near Pueblo, Colorado, is managed by the Department of the Interior's Bureau of Reclamation as part of the Fryingpan-Arkansas Project. It has a storage capacity of approximately 357,000 acre-feet. *Ibid.* The Trinidad Reservoir, located on the Purgatoire River near Trinidad, Colorado, is jointly managed by the Army Corps of Engineers and the Bureau of Reclamation to control floods and to provide storage water for use by the Bureau of Reclamation's Trinidad Project. It has a storage capacity of approximately 114,000 acre-feet. *Ibid.*

Twenty-three canal systems in Colorado divert water from the Arkansas River below Pueblo Reservoir for irrigation. Fourteen of those systems are located upstream from John Martin Reservoir, and four of those systems have associated privately-owned, off-channel water storage facilities. Six canal systems in Kansas operate between the Colorado border and Garden City. See 514 U.S. at 677.

B. The Arkansas River Compact

The Arkansas River Compact apportions the Arkansas River between the States of Kansas and Colorado. The Compact was an outgrowth of two original actions that the States had filed in this Court disputing their respective entitlements to use of the Arkansas River. See 514 U.S. at 678. In each of those cases, the Court denied Kansas's request for an equitable apportionment. See *Kansas* v. *Colorado*, 206 U.S. 46, 114-117 (1907); *Colorado* v. *Kansas*, 320 U.S. 383, 391-392 (1943).

In the first suit, Kansas sought to enjoin water diversions in Colorado, but the Court denied relief on the ground that Colorado's depletions of the Arkansas River were insufficient at that time to warrant injunctive relief. *Kansas* v. *Colorado*, 206 U.S. at 114-117. In the second suit, Colorado sought to enjoin lower court litigation brought by Kansas water users against Colorado water users, while Kansas sought an equitable apportionment of the Arkansas River. The Court concluded that Colorado was entitled to the injunction it sought, but the Court concluded once again that Kansas had failed to show sufficient injury to warrant an equitable apportionment of the Arkansas River. *Colorado* v. *Kansas*, 320 U.S. at 391-392; see *Kansas* v. *Colorado*, 514 U.S. at 678.

In denying Kansas's second request for judicial relief, the Court suggested that a dispute such as the one between Kansas and Colorado calls for "expert administration rather than judicial imposition of a hard and fast rule," and it observed that the controversy "may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution." *Colorado* v. *Kansas*, 320 U.S. at 392. Soon thereafter, the States approved, and Congress ratified, the Arkansas River Compact, Act of May 31, 1949, ch. 155, 63 Stat. 145. The Compact was intended to "[s]ettle existing disputes and remove causes of future controversy" between the States and their citizens over the use of the Arkansas River. To that end, the Compact was designed to

> [e]quitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

Art. I, 63 Stat. 145. The Compact accomplishes those goals through two basic mechanisms.

First, the Compact protects the States' respective rights to continued use of the Arkansas River through a limitation on new depletions. Article IV-D of the Compact allows new development in the form of dams, reservoirs, and other water-utilization works in Colorado and Kansas, provided that the "waters of the Arkansas River" are not thereby "materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact." 63 Stat. 147. The Compact defines the term "waters of the Arkansas River," Art. III-B, 63 Stat. 146, but it does

not expressly define what constitutes a "material" depletion or a "usable" quantity.[1]

Second, the Compact regulates the storage of water at John Martin Reservoir and specifies the criteria under which each State is entitled to call for water releases from that reservoir. Article V of the Compact, which provides the "basis of apportionment of the waters of the Arkansas River," prescribes the timing of storage at the reservoir and the release criteria. 63 Stat. 147-149. Basically, between November 1 and March 31, in-flows to the John Martin Reservoir are stored, subject to Colorado's right to demand a limited amount of water. Between April 1 and October 31, the storage of water is largely curtailed, and either State may call for releases at any time in accordance with the flow rates set out in the Compact. *Ibid.*

The Compact creates an interstate agency, the Arkansas River Compact Administration, to administer the Compact. Art. VIII, 63 Stat. 149-151. The Compact Administration consists of a non-voting presiding officer designated by the President of the United States and three voting representatives from each State. It is

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[1] The full text of Article IV-D states as follows:

> This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoirs, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

63 Stat. 147.

empowered to adopt by-laws, rules, and regulations, prescribe procedures for the administration of the Compact, and perform functions to implement the Compact. See Arts. VIII-B, VIII-C, 63 Stat. 149, 150. Article VIII-H of the Compact directs that the Administration shall "promptly investigate[]" violations of the Compact and report its findings and recommendations to the appropriate state official. 63 Stat. 151. That Article further states that it is "the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights." *Ibid.*

C. The Current Proceedings

Kansas brought this action in 1985 to enforce the provisions of the Arkansas River Compact. Special Master Littleworth filed his initial report with the Court in July 1994 addressing issues of liability. He recommended that the Court find that post-Compact well pumping in Colorado had violated Article IV-D of the Compact and that Colorado be held liable for that violation. The Master also recommended that the Court find no violation of the Compact with respect to Kansas's claims arising from the operation of the Trinidad Reservoir and the Winter Water Storage Program that utilizes excess storage capacity at the Pueblo Reservoir. The Court adopted all of the Master's recommendations and remanded for determination of the unresolved issues—primarily relating to what remedy, if any, Kansas was entitled to as a result of Colorado's breach. *Kansas* v. *Colorado*, 514 U.S. at 694; see Fourth Report 2-3.

On recommittal, the Master conducted further proceedings and issued a Second Report providing his

preliminary recommendations on the issues of: (a) quantifying the depletions in flows of the Arkansas River at the Colorado-Kansas border (stateline flows) for the period 1950-1985; (b) quantifying depletions for the period subsequent to 1985; (c) bringing Colorado into current compliance with the provisions of the Compact; and (d) a remedy for past depletions. The Court invited the parties to file exceptions to the recommendations contained in the Master's Second Report. See 522 U.S. 803 (1997). Kansas and the United States did not file any exceptions. Colorado challenged the Master's conclusions that (1) if the remedy includes money damages, the Eleventh Amendment of the United States Constitution does not bar an award of money damages based, in part, on losses incurred by Kansas's water users; and (2) the unliquidated nature of Kansas's claim for damages does not, in and of itself, bar the award of prejudgment interest. The Court overruled Colorado's exceptions without prejudice to Colorado's right to renew those exceptions at the conclusion of the remedy phase of the case. 522 U.S. at 1073-1074; see Fourth Report 3.

After conducting further proceedings, including a trial on the appropriate remedy for Colorado's violations of the Compact, the Master issued his Third Report, dated August 2000, containing his recommended remedy. The Master's Third Report calculated the total depletions of stateline flow for the period from 1950 to 1996 (428,005 acre-feet); it recommended that a suitable remedy for Kansas could include money damages based upon the economic losses of Kansas's water users; and it recommended that Kansas should be entitled to prejudgment interest, but only for those damages sustained after 1969, when Colorado knew or should have known that groundwater wells were

depleting streamflows. The Court overruled all of Kansas's and Colorado's exceptions but one: with respect to the calculation of prejudgment interest, the Court ruled that, as a matter of equity in this case, prejudgment interest should begin to accrue in 1985, when Kansas filed its complaint. See 533 U.S. at 15-16.

Upon recommittal, the Special Master conducted further trial proceedings and issued his Fourth Report, which contains 13 recommendations that, if accepted by the Court, would allow for entry of a final decree in this case. See Fourth Report 137-140. The Master has recommended a final measure of money damages and prejudgment interest and has proposed the adoption of various rules, credits, and measurement and modeling criteria for assessing future compliance. *Id.* at 137-139. In addition, the Master has recommended that the Court reject Kansas's proposals that the Court reopen issues respecting the Winter Water Storage program (which was addressed in the Master's First Report), *id.* at 137, that the Court establish an "Offset Account" to ensure Colorado's future compliance, *id.* at 139, and that the Court appoint a "river master" to administer the final decree in this case, *ibid.* Kansas alone has filed exceptions to the Master's Fourth Report.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Kansas brought this action to enforce its rights under the Arkansas River Compact, which apportions the flow of the Arkansas River between Kansas and Colorado. This Court resolved the issues of liability in its earlier decision in *Kansas* v. *Colorado*, 514 U.S. 673 (1995), which accepted the Master's recommendation that Colorado be held liable for violations of Article IV-D of the Compact resulting from post-Compact well pumping in Colorado. In the subsequent

proceedings, the Master has focused on an appropriate remedy for those violations. The United States, which intervened in this action to address Kansas's challenges to the operation of federal projects on the Arkansas River, has played a diminished role in proceedings concerning an appropriate remedy for the post-Compact well pumping, which is a matter of primary concern for the States. The United States nevertheless has a significant institutional interest in the proper administration and enforcement of interstate compacts, and it participated in briefing and argument on several issues (including prejudgment interest) the last time the case was before the Court on exceptions to recommendations by the Master. The United States submits this brief to provide the Court with the federal government's perspective on two issues that bear on federal interests—whether the Court should appoint a "river master" to administer the final decree; and whether Kansas is entitled to prejudgment interest, beginning in 1985, for damages it suffered from Compact violations occurring before that date.

I. The Court should reject Kansas's request for the appointment of a river master to resolve anticipated issues respecting the use of a computer model measuring Colorado's future compliance with the Compact. This Court, on rare occasions, has appointed a river master to administer interstate water rights decrees, but that unusual step is not necessary in this case. Congress and the compacting States have created the Arkansas River Compact Administration, composed of representatives from Kansas and Colorado and chaired by a non-voting federal representative, to administer the Compact. The Administration is the appropriate body to resolve complex technical issues respecting the computer model that will be used to measure

Colorado's compliance with its Compact obligations. The States should employ that body, as Congress envisioned, to provide expert administration and resolve disputes through consensual mechanisms. Appointment of a separate river master is not appropriate in these circumstances, and would likely promote continued adversarial proceedings and prolong this litigation.

II. The Court should also reject Kansas's approach to the calculation of prejudgment interest, which would subject damages accruing before 1985 to prejudgment interest commencing in that year. This Court determined in its 2001 decision that Kansas was entitled to prejudgment interest only from 1985 forward. See *Kansas* v. *Colorado*, 533 U.S. at 14-16. In reaching that conclusion, the Court relied on the States' prior determination that prejudgment interest would not be applied to damages accruing before the date that prejudgment interest began to run. The Master correctly concluded that he should retain that calculation methodology, which reflected the understanding of the States and this Court in the prior proceedings. That approach, which would result in an award to Kansas of approximately $29 million for damages from 1950 to 1994 (measured in 2002 dollars) provides a fair result in light of the equities in this case.

ARGUMENT

I. THIS COURT SHOULD NOT APPOINT A RIVER MASTER TO ADMINISTER THE FINAL DECREE

The Special Master and the parties have determined that Colorado's future compliance with the Arkansas River Compact should be determined, in part, by use of a computer program, known as the Hydrologic-Institutional Model (H-I Model), which was developed for

purposes of this litigation. The H-I Model estimates the flow of the Arkansas River that would have occurred in the absence of post-Compact well pumping. That estimated streamflow is then used to determine whether Colorado has met its obligation under Article IV-D of the Compact of ensuring that any new water development in Colorado has not materially depleted the Arkansas River's flow at the Colorado-Kansas border.

As the Master explained, the task of modeling the Arkansas River Basin is extraordinarily complex. Fourth Report 109-110. The Master found that, despite continuing refinements, the H-I Model is not accurate on an annual basis or short-term basis. *Id.* at 109-115. He therefore adopted Colorado's proposal that the H-I Model results be applied over a ten-year period to average out errors. *Id.* at 116-120.[2] He also anticipated that there would be a continuing need to update the H-I Model as experience revealed opportunities for improving it, but that the States might disagree on what changes should be made. *Id.* at 121-124. In response, Kansas proposed that the Court should appoint a river master to resolve those disputes on a continuing basis. See *id.* at 125. Colorado objected to that proposal on the ground that the result would be "to continue this litigation indefinitely." *Ibid.* The Master rejected Kansas's proposal, concluding that such an appointment was not appropriate in this case. See *id.* at 125-136. Kansas excepts from the Master's recommendation. Kan. Br. 10-25.

The United States agrees with the Special Master's recommendation that appointment of a river master is not appropriate in the circumstances presented here.

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[2] Kansas has excepted from that recommendation. See Kan. Br. 35-45. The United States takes no position on that exception.

As the Master acknowledged, this Court appointed a river master in *Texas* v. *New Mexico*, 482 U.S. 124, 134-135 (1987), to apply a formula for apportioning the Pecos River's flows, and in *New Jersey* v. *New York*, 347 U.S. 995, 1002-1004 (1954), to make flow calculations in administering a decree respecting the Delaware River. See Fourth Report 125-128, 129-130. But as a general matter, the Court has "taken a distinctly jaundiced view of appointing an agent or functionary to implement [its] decrees." *Texas* v. *New Mexico*, 482 U.S. at 134. See *Vermont* v. *New York*, 417 U.S. 270, 274-277 (1974).[3]

The Court has appointed a river master with continuing authority to administer a decree only in instances in which there was a clear need or desirability for such an appointment. In *Texas* v. *New Mexico*, the Court appointed a river master, at the suggestion of the special master, because, otherwise, "the natural propensity of these two States to disagree if an allocation formula leaves room to do so" would lead to "a series of original actions to determine the periodic division of the water flowing in the Pecos." 482 U.S. at 134. In *New Jersey* v. *New York*, the Court appointed a river master, as recommended in the report of the special master, 347 U.S. at 995-996, to perform what the Court has since characterized as essentially "ministerial acts," *Vermont* v. *New York*, 417 U.S. at 275.

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[3] As the Master explained, the Court has rejected the appointment of a river master or similar agent in *Wisconsin* v. *Illinois*, 281 U.S. 179, 198 (1930); *New Jersey* v. *New York*, 283 U.S. 805 (1931); *Wyoming* v. *Colorado*, 298 U.S. 573, 586 (1936); and *Vermont* v. *New York*, 417 U.S. at 277. See Fourth Report 130-131.

In this case, by contrast, the Master concluded that the appointment of a river master to resolve computer modeling issues could be counter-productive:

> None of the interstate water cases supports the appointment of a River Master with authority to decide the kinds of issues that may still arise with respect to continued compliance with the Arkansas River Compact. Any such issues are not likely to be simply "ministerial" in nature. If a River Master is appointed with sufficiently broad authority to resolve modeling issues, it simply becomes easier to continue this litigation. But it is in the opposite direction that movement is needed.

Fourth Report 135-136.

The Master's reluctance to recommend appointment of a river master charged with deciding complex, technical issues of computer-based streamflow modeling is understandable for additional reasons bearing on this Court's responsibility to supervise such agents. If the Court elected to review the river master's determinations with the same care that it examines a special master's findings of fact, see *Colorado* v. *New Mexico*, 467 U.S. 310, 317 (1984), the Court would need to devote its limited resources to reviewing highly technical scientific and engineering issues of limited national significance. Alternatively, if the Court elected to defer broadly to the river master's determinations, it would put in place a quasi-judicial officer with indefinite tenure who would exercise largely unreviewable discretion. It is only in the "rare case" that the Court creates such an office. See *Vermont* v. *New York*, 417 U.S. at 275.

More fundamentally, the appointment of a river master is neither desirable nor necessary because there

is an available and preferable alternative. The Arkansas River Compact establishes the Arkansas River Compact Administration to administer the Compact, to adopt rules and regulations and prescribe procedures for that purpose, and to "[p]erform all functions required to implement this Compact and to do all things necessary, proper, or convenient in the performance of its duties." Art. VIII-B, 63 Stat. 149-150. The Compact further provides that violations of any provisions of the Compact "or other actions prejudicial thereto" shall be promptly investigated by the Administration. Art. VIII-H, 63 Stat. 151. The Administration, which has been charged by Act of Congress and agreement between the States with responsibility for implementing the Compact, is the appropriate body to resolve issues respecting any necessary modifications of the H-I Model, which will be utilized specifically to determine Colorado's compliance with its obligations under the Compact.

Kansas has objected to enlisting the Compact Administration's assistance based on its prediction that the Administration, which is composed of a non-voting federally appointed chairman and three representatives from each State, would inevitably deadlock, as was the situation in the case of the Pecos River Compact Commission. See Kan. Br. 12-14, 24-25; see also *Texas* v. *New Mexico*, 482 U.S. at 133, 134. The Master concluded that this prediction was not warranted, stating:

> To be sure, the Compact Administration can act only by unanimous vote. But the climate may be changing. The Compact Administration, under the chairmanship of the United States' representative, may again be seen as the best way to administer the compact and settle issues. After some thirteen

> years of litigation, the major issues between the states have already been determined or will be determined as a result of this Report. If there are future issues, it is to be hoped that the parties will have a greater appreciation for the Court's oft-stated admonition that litigation of these cases "is obviously a poor alternative to negotiation." *Texas* v. *New Mexico*, 462 U.S. 554, 567, fn.13, and 575, citing numerous cases.

Fourth Report 136.

Congress and the States created the Compact Administration to provide the "expert administration" that this Court envisioned in *Colorado* v. *Kansas*, 320 U.S. at 392. They required the Compact Administration to act by unanimous vote because they recognized the value of resolving interstate disputes by consensus. They also presumably recognized that consensus would sometimes be difficult to achieve, but that is no reason for failing to undertake the effort to reach agreement through the procedures that the Compact provides. Indeed, the Compact specifies an optional mechanism for breaking deadlocks:

> In a case of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event the decision made by such arbitrator or arbitrators shall be binding upon the Administration.

Art. VIII-D, 63 Stat. 150. Additionally, the Compact does not preclude the parties from engaging in other mechanisms of alternative dispute resolution, such as non-binding mediation, which was successfully employed in *Kansas* v. *Nebraska*, No. 126, Original, to negotiate a comprehensive resolution of that case. See *Kansas* v. *Nebraska*, 538 U.S. 720 (2003) (decree approving final settlement stipulation); Second Report of the Special Master (Final Settlement Stipulation), *Kansas* v. *Nebraska*, No. 126, Original (Apr. 15, 2003).[4]

The United States accordingly urges that the Court overrule Kansas's proposal for the appointment of a river master to administer the anticipated decree in this case. Instead, the Court should direct the Master to propose a decree, with the assistance of the parties, that would provide that the parties may seek resolution of disputes over the revision of the H-I Model through recourse to the Compact Administration.

II. KANSAS IS NOT ENTITLED TO PREJUDGMENT INTEREST, BEGINNING IN 1985, FOR DAMAGES IT SUFFERED FROM COMPACT VIOLATIONS OCCURRING BEFORE THAT DATE

In the prior proceedings, the Court faced the question whether, and to what extent, Kansas was entitled to prejudgment interest on the money damages that it will receive on account of Colorado's past violations of the Compact. See *Kansas* v. *Colorado*, 533 U.S. at 9-16. The United States addressed that issue in response to Kansas's and Colorado's competing excep-

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[4] As the Master recognized, in recent interstate water disputes, the States have increasingly employed alternative means of dispute resolution to resolve pending or anticipated disputes. See Fourth Report 132-135. The United States has encouraged the use of such techniques in original actions, such as *Nebraska* v. *Wyoming*, No. 108, Original, and *Kansas* v. *Nebraska*, No. 126, Original, as a means to defuse or resolve interstate disputes that might otherwise lead to motions for leave to invoke this Court's original jurisdiction.

tions, urging that this Court may award prejudgment interest as a matter of discretion based on the equities of the case. Because Kansas and Colorado now disagree on the proper interpretation of the Court's 2001 decision, the United States offers its perspective on what the Court decided.

In its 2001 decision, the Court determined that it may award prejudgment interest in an original action arising from an interstate compact, even if the money damages at issue are unliquidated at the time of suit. *Kansas* v. *Colorado*, 533 U.S. at 9-11. The Court also decided for what years prejudgment interest would accrue. Kansas argued that the accrual of interest should begin in 1950, when Colorado's violations commenced, while Colorado argued that any prejudgment interest should not begin to accrue until 1985, when Kansas first filed its complaint. The Master concluded that prejudgment interest should begin to accrue in 1969, when, according to the Master, Colorado knew or should have known that it was violating the Compact. See *id.* at 12.

The Court ultimately rejected the Master's recommendation and concluded that prejudgment interest should begin to accrue in 1985, rather than 1969. The Court explained:

> The choice between the two dates is surely debatable; it is a matter over which reasonable people can—and do—disagree. After examining the equities for ourselves, however, a majority of the Court has decided that the later date is the more appropriate.

533 U.S. at 15 (footnote omitted).[5] The Court additionally stated:

> Given the uncertainty over the scope of damages that prevailed during the period between 1968 and 1985 and the fact that it was uniquely in Kansas' power to begin the process by which those damages would be quantified, Colorado's request that we deny prejudgment interest for that period is reasonable.

Id. at 16. The Court accordingly sustained Colorado's exception "insofar as it challenges the award of interest for the years prior to 1985." *Ibid.*

On recommittal of the case to the Special Master, Colorado argued that the Court's 2001 decision entitled Kansas to prejudgment interest only on those damages that accrued after 1985. Kansas, by contrast, argued that the Court's 2001 decision also entitled it prejudgment interest, beginning in 1985, on the damages that accrued during the period from 1950 through 1985. The difference in those positions has a substantial impact on the amount of damages. Under Colorado's approach, the total damage award for the 1950 to 1994 period, adjusted for inflation, is $28,998,366 (in 2002 dollars), while under Kansas's approach, the total

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[5] The Court explained in an accompanying footnote that Justices O'Connor, Scalia, and Thomas believed that no award of prejudgment interest was appropriate, while the Chief Justice and Justice Kennedy believed that prejudgment interest should run from the date of filing the complaint. 533 U.S. at 15 n.5. Justices Stevens, Souter, Ginsburg, and Breyer agreed with the Special Master that prejudgment interest should run from 1969, but "[i]n order to produce a majority for a judgment, the four Justices who agree with the Special Master have voted to endorse the position expressed in the text." *Ibid.*

damage award for that period is $52,879,927 (in 2002 dollars). See Fourth Report 7. The Master concluded that Colorado's calculation correctly implements this Court's decision. See *ibid.*; *id.* at App. 7-15. The United States agrees.

As the Master explained, in the proceedings leading up to the Court's 2001 decision, both Kansas and Colorado demonstrated an understanding that prejudgment interest would be applied only to those damages that accrued after the date on which prejudgment interest commenced. See Fourth Report App. 12. In particular, the Master directed the States to calculate the total amount of damages under the Master's recommendation that prejudgment interest commence in 1969. The States concluded that the total damages for the period from 1950 to 1994 was approximately $38 million (in 1998 dollars), and that information was conveyed to this Court. *Ibid.* In reaching that conclusion, the States "treated damages for the period from 1950-68 as being completely exempt from any interest reflecting lost investment opportunities." Fourth Report App. 13. For that period, Kansas was to receive only an adjustment of the damages to account for inflation, which Colorado had always proposed. *Id.* at 10; see 533 U.S. at 9 n.2. "In essence, the states followed the methodology now urged by Colorado, except they were dealing with 1969 instead of 1985." *Ibid.* In filing exceptions to the Master's Third Report, Kansas did not challenge the use of that methodology if the Court concluded (contrary to Kansas's submission) that prejudgment interest should accrue in 1969 or 1985.[6]

[6] In opposing the States' exceptions, the United States shared their understanding that the Master had recommended imposition of prejudgment interest only on damages accruing after 1968. See Brief for the United States in Opposition to the Exceptions of Kansas and Colorado, *Kansas* v. *Colorado*, No. 105, Original (Jan. 2001), at 27 ("Based on his finding that by 1968 Colorado knew, or should have known that post-compact wells were causing material depletions of usable stateline flows, the Master recommended that Kansas be awarded actual damages for the period from 1950 to 1968, adjusted for inflation only. For the period from 1969 to the date of judgment, the Master recommended that Kansas be awarded prejudgment interest.").

The Master properly concluded that, when this Court determined that prejudgment interest would commence in 1985, rather than in 1969, the Court did not intend to change the method by which the States had determined to calculate the interest award. As the Master recognized:

> Clearly there was no sentiment on the Court to increase damages, including prejudgment interest, over the amount recommended in my Third Report. Indeed, the final action of the Court was to reduce my recommended award.

Fourth Report App. 14. The damage award that would result from the application of the Master's proposed approach—approximately $29 million for the period from 1950 to 1994 (in 2002 dollars)—is consistent with the amount of damages that the Court envisioned would be awarded in this case. See *Kansas* v. *Colorado*, 533 U.S. at 9 n.2.

Kansas suggests that the Master's approach is inconsistent with the methods used in calculating prejudgment interest in other cases, outside this Court's original jurisdiction, in order to compensate fully the plaintiff for the delay in payment by the defendant. Kan. Br. 28-29. But even if that is so, this original

action, with its unique history and equities, is sui generis. See *Kansas* v. *Colorado*, 533 U.S. at 13-16. The Court has considerable discretion to award or withhold prejudgment interest based on the equities of a particular case. Consistent with that approach, the Court's prior decision in this case rejected Kansas's arguments based on a "rigid theory of compensation for money withheld," *id.* at 15, and reflects an intention to retain the methodology that the parties had employed for calculating prejudgment interest in the wake of the Master's Third Report, while providing that prejudgment interest would commence in 1985. See *id.* at 16 ("[W]e sustain [Colorado's] objection insofar as it challenges the award of interest for the years prior to 1985.").

The United States accordingly urges the Court to overrule Kansas's exception respecting the Master's calculation of prejudgment interest. The Master was justified in concluding that the Court intended to exempt all damages occurring before the suit was filed from prejudgment interest reflecting lost investment opportunities. See Fourth Report App. 14. Damages occurring before that date remain subject to an adjustment for inflation, to which Colorado has always agreed. See *id.* at 11. That result is fair, particularly in light of the uncertainties attending the availability of money damages and prejudgment interest as a remedy for violation of an interstate compact at the time the Arkansas River Compact was negotiated. See 533 U.S. at 20-26 (O'Connor, J., concurring in part and dissenting in part).

CONCLUSION

The exceptions of Kansas respecting the appointment of a river master and the award of prejudgment interest should be overruled.

Respectfully submitted.

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